



**Muriithi & another v Akaranga (Civil Appeal E057 of 2021)
[2024] KEHC 13771 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E057 OF 2021
HI ONG'UDI, J
NOVEMBER 7, 2024**

BETWEEN

WILSON MURIITHI 1ST APPELLANT

JOHN WAITHAKA THUO 2ND APPELLANT

AND

TYSON ASANO AKARANGA RESPONDENT

RULING

1. The applicant filed the Notice of Motion dated 3rd February, 2023 seeking dismissal of the instant appeal for want of prosecution. He also prayed for costs. The application is premised on the grounds on its face plus the supporting affidavit by Evans Juma Matunda the applicant's counsel sworn on even date.
2. It is generally the applicant's case that since the lodging of the appeal on 28th February, 2021, the same has never been set down for hearing nor any alternative avenues of prosecution been pursued. It is therefore his prayer that the appeal be dismissed for want of prosecution.
3. The appellant/respondents filed an undated replying affidavit by Lawrence Njuguna their counsel. Its their case that the main reason for the delay is lack of the lower court proceedings, Judgment and decree. The deponent annexed letters requesting for proceeding (LN 1 & 2) dated 17/8/2022, 26/8/2022, 3/9/2022 and 30/11/2022 respectively. He thus urged the court not to place undue regard to procedural technicalities and dismiss the application with costs.
4. Directions were issued on 7/11/2023 for the application to be canvassed by written submissions. The respondent/applicant filed his submissions dated 24/01/2024, on the same day. The appellants/respondents did not file any submissions.



Respondent's/applicant's submissions

5. These were filed by E. M. Juma & Company advocates. Counsel submitted that the present application is founded on the Order 42 Rule 35(2) and Order 17 Rule 2(3) of the civil Procedure Rules where parties are expected to act on their matters within a year. He relied on the case of *Utalii Transport Company Limited & 3 others V NIC Bank Limited & another* [2014] eKLR where Gikonyo J outlined the principles to be considered in an application of this nature.
6. It is counsel's submission that the two (2) years delay in this matter is inordinate. He contends that the delay herein is purely intentional and its only being used by the appellant as a means to buy time at the expense of the respondent and the court. He cited the case of *Mwangi S. Kimenyi V Attorney General & another Misc Civil Suit No. 720 of 2009* where the court held:

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away for the parties”.
7. Counsel further submitted that the appellant's failure to set down the appeal for directions was a waste of the court's time and disregard of the set court processes under Order 42 Rules 11 & 13 of the Civil Procedure Rules. This to him is blocking the respondent/applicant from accessing justice. This in the end is a violation of Article 159 (2) of *the Constitution*, as the unprosecuted appeal has barred the respondent/applicant from enjoying the fruits of a successful court process. To support this argument counsel relied on the case of *Njuki Gachugu V Githii* [1977] KLR 108 and submitted that the delay had caused the respondent psychological torture due to the unending trial, and he continues to spend money in legal expenses.
8. Finally, counsel submitted that dismissal of the appeal will not prejudice the appellants in any way. The reasons being that the appellants were 90% to blame for the accident, as the respondent was only a lawful fare-paying passenger.

Analysis and determination

9. I have carefully considered the application, both affidavits, annexures and the respondent's/applicant's written submissions, and the only issue I find falling for determination is whether this appeal is ripe for dismissal.
10. The law upon which this application is anchored is Order 42 Rule 11 Civil Procedure Rules which provides:

“Upon filing of the appeal, the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

Order 42, rule 13 provides:

“On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers”.



Order 42, rule 35(2) provides:

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”.

11. The record herein shows that the memorandum of appeal dated 28/05/2021 was filed on 02/05/2021. On 15/06/2021 the appellant's filed a notice of motion dated 14/06/2021 seeking:
 - i. Stay of execution of the lower court Judgment in Nakuru CMCC No. 55 of 2019 delivered on 28/01/2021.
 - ii. Stay of the ruling/order in the same matter issued on 27/05/2021.
12. The application was heard and a ruling delivered by Chemitei J on 16/12/2021. His Lordship dismissed the application with costs.
13. Thereafter the respondent/applicant filed the present application. The same was mentioned thrice i.e 25/04/2023, 06/07/2023 and 26/09/2023 but no directions were issued because on two occasions the appellant/respondents were absent while the respondent/applicant did not attend court on 25/04/2023.
14. On 07/11/2023 this court issued directions on the hearing of this application and gave a mention date for 25/01/2024 to confirm compliance. When the matter was finally mentioned on 26/09/2024 after failed mentions the court confirmed that it was only the respondent/applicant who had filed submissions to the application. The appellants/respondents were not in attendance.
15. Besides the above the appellants/respondents annexed to their replying affidavit communication with the court on the issue of typed proceedings, Judgment and decree. The last such communication was on 30/11/2022.
16. No explanation has been given to this court to show why the appellant/respondents have never to date prepared the record of appeal. It is not the duty of this court to go inquiring from them on this. If indeed there was any genuine reason, there is nothing that stopped them from notifying the court or even filing their submissions and stating the challenges if any.
17. As can be seen from the record it is now exactly 3 years plus 5 months since the appeal herein was filed. The appellant/
respondent have NEVER moved the court for directions to be taken under order 42 Rules 11 & 13 of the Civil Procedure Rules. They have also not filed any record of appeal.
18. This court has not been able to give any directions under Order 42 rule 13(4) Civil Procedure Rules for admission of the appeal, due to the laxity by the appellant/respondents.
19. The respondent/applicant has a Judgment in his favour from the lower court. He can't enjoy its fruits because of this pending appeal.
20. Upon consideration of all I have stated above, I find that the appellant/respondents have not been keen on prosecuting their appeal. Secondly there is nothing that has been placed before this court to explain their inordinate delay of over three (3) years.



21. Considering that Justice must serve both parties I find that the appellants/respondents inaction should not be condoned any further. I therefore find merit in the application dated 3rd February, 2023 which I hereby allow with costs.

22. Orders accordingly

DELIVERED, VIRTUALLY, DATED, SIGNED THIS 7TH DAY OF NOVEMBER, IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

